

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
KXAN, Inc.)	
)	CSR-7825-N
Petition For Waiver of Sections 76.92(f) and)	
76.106(a) of the Commission's Rules)	

MEMORANDUM OPINION AND ORDER

Adopted: March 31, 2010

Released: April 1, 2010

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. KXAN, Inc., licensee of station KXAN-TV (NBC), Austin, Texas ("KXAN-TV"), filed the captioned petition seeking a waiver of the rule that precludes the deletion of programming of "significantly viewed" stations under the cable television network nonduplication and syndicated exclusivity rules.¹ Specifically, KXAN-TV seeks a waiver of the significantly viewed exception so that it may enforce its network nonduplication and syndicated exclusivity rights against KCEN-TV (NBC), Temple, Texas ("KCEN-TV") in the communities of Georgetown and Round Rock, Texas.² An opposition to this petition was filed on behalf of Cebridge Acquisition, L.P. d/b/a Suddenlink Communications ("Suddenlink"), operator of a cable system serving the communities of Georgetown and Round Rock, Texas. Suddenlink opposes KXAN-TV's waiver request as it relates solely to the community of Georgetown. KXAN-TV filed a reply to Suddenlink's opposition. In this decision, we grant KXAN-TV's waiver of the significantly viewed exception with respect to Round Rock and Georgetown. However, we find that despite our waiver and because of the exceptions contained in our exclusivity rules, KXAN-TV may not assert its exclusivity rights against KCEN-TV in Georgetown. It may, however, assert its exclusivity rights against KCEN-TV in Round Rock.

¹47 C.F.R. §§ 76.92(f) and 76.106(a). Although not expressly requested in KXAN-TV's petition for waiver of Sections 76.92(f) and 76.106(a) (significantly viewed exception to cable network nonduplication and syndicated exclusivity), a waiver of Sections 76.122(j) and 76.123(k) (significantly viewed exception to satellite network nonduplication and syndicated exclusivity) would also appertain based on the same showing that a station is no longer significantly viewed in the relevant community. See 47 C.F.R. §§ 76.92(f), 76.106(a), 76.122(j), and 76.123(k). See 47 U.S.C. §§ 340(a)(2) and 340(c).

²Petition at 1.

II. BACKGROUND

2. Upon the request of a local television station with exclusive rights to distribute a network or syndicated program, a cable operator generally may not carry a duplicating program broadcast by a distant station.³ Under Section 76.92(f) of the Commission's rules, however, a signal otherwise subject to deletion is exempt from application of the network nonduplication rules if it is "significantly viewed" in the relevant community (the "significantly viewed exception").⁴ The significantly viewed exception to the exclusivity rules is based on a demonstration that an otherwise distant station receives a "significant" level of over-the-air viewership in a subject community. If this viewership level is met, the station is no longer considered distant for purposes of the application of the exclusivity rules because it has established that it is viewed over the air in the subject community. A similar exception is provided in the syndicated exclusivity rules.⁵

3. In order to obtain a waiver of Section 76.92(f), the Commission held in *KCST-TV, Inc.*⁶ that petitioners would be required to demonstrate for two consecutive years that a station was no longer significantly viewed, based either on community-specific or system-specific over-the-air viewing data, following the methodology set forth in Section 76.54(b) of the Commission's rules. Section 76.5(i) requires that for network stations to be considered significantly viewed, the survey results should exceed a 3 percent share of total viewing hours and a net weekly circulation of 25 percent, by at least one standard error.⁷ For independent stations (*i.e.*, non-network stations), to be considered significantly viewed, Section 76.5(i) of the Commission's rules requires that the survey results should exceed a 2 percent share of total viewing hours and a net weekly circulation of 5 percent, by at least one standard error.⁸ The Commission has found that this type of test is applicable as well for waivers of the syndicated exclusivity exemption.⁹

4. Since the Commission's decision in *KCST-TV*, the methodology required by Section 76.54(b) of the rules for a petitioner seeking a waiver of the significantly viewed exception has evolved, pursuant to case law and market realities. Section 76.54(b) states in pertinent part that significant viewing "may be demonstrated by an independent professional audience survey of [over-the-air] television homes that covers at least two weekly periods separated by at least 30 days but no more than one of which shall be a week between the months of April and September."¹⁰ Over time, The Nielsen Company ("Nielsen") became the primary surveying organization through which a petitioner could obtain television surveys.¹¹ Nielsen, which routinely surveys television markets to obtain television

³See 47 C.F.R. §76.92; 47 C.F.R. §76.101.

⁴47 C.F.R. §76.92(f); see 47 C.F.R. §§76.5(i) and 76.54.

⁵47 C.F.R. §76.106(a).

⁶103 FCC 2d 407 (1986).

⁷47 C.F.R. §76.5(i).

⁸*Id.*

⁹See *Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640 (1990).

¹⁰47 C.F.R. § 76.54(b). The criteria set forth in *KCST-TV* require that two separate surveys be performed pursuant to Section 76.54(b) in consecutive years. The provisions of Section 76.54(b) therefore apply to each year's survey. It should be noted that these types of surveys cannot be conducted by the affected television station, cable system or satellite operator.

¹¹The Nielsen Company was previously known as Nielsen Media Research.

stations' viewership, conducts four-week audience surveys four times a year (*i.e.*, February, May, July and November "sweep periods"). The Bureau has found that replacing each week required under *KCST-TV* with a sweep period is acceptable and, if anything, adds to the accuracy of the audience statistics because of the increased sample size.¹² Accordingly, a petitioner may submit the results from two sweep periods in each year. For use in exclusivity waivers, a petitioner may purchase survey data from Nielsen on either a community-specific or system-specific basis.¹³ If a petitioner is purchasing survey data on a system-specific basis where two or more communities are involved, the percentage of diaries from each community surveyed must be approximately the same as the percentage of the total population for each community served by the cable system.¹⁴ In order to produce the data required for exclusivity waivers, Nielsen re-tabulates the data that it collects from over-the-air households for its routine audience sweep periods, selecting in-tab diaries from its database from the area served by a cable system or an individual cable community.¹⁵ It should be noted that, despite the fact that a petitioner is purchasing a re-tabulation of data that has already been collected, it is still obligated to notify interested parties prior to the purchase of such data, pursuant to the requirements set forth in Section 76.54(c) of the Commission's rules.¹⁶ Such notice should indicate the surveying organization, the methodology used to calculate the viewing shares (*e.g.*, a description of the process used to re-tabulate the information in an existing database), the manner in which the communities (and/or zip codes) were selected, and the survey periods used.¹⁷ Notification to interested parties before the purchase of Nielsen data allows a petitioner to correct any

¹²Although, in general, petitioners are prohibited from using two surveys between April and September (*i.e.*, May or July sweeps), we have not ruled out a petitioner providing all sweeps in a year where more than two are submitted. See *WTNH Broadcasting, Inc. and K-W TV, Inc.*, 16 FCC Rcd 6781, 6784 (2001), where the Bureau did not reject the petition because of the inclusion of both May and July data, but only concluded that, in such a case, it would be necessary to provide individual survey period results so that we could determine the effect of the third and fourth sweep periods.

¹³It should be noted that Nielsen identifies individual communities by zip codes, a process not incompatible with the surveying process discussed here.

¹⁴47 C.F.R. § 76.54(b). Proportionality based on population demonstrates that more weight is given to larger communities. While there must be at least one diary from each community in each survey, there is no minimum sample size since the standard error allows us to be sure that there is a high probability that the reported result meets or falls below our criteria. Because Nielsen is able to weight its sampling, they can provide such proportionality.

¹⁵In-tab diaries are the number of diaries that are included in the tabulation of audience shares. Of the returned diaries, some are discarded after editing as unusable. Thus, in-tab diaries are the number of diaries used in the sample to calculate the audience statistics. It should be noted that we expect petitioners who commission such data to include, along with the survey data itself, a description of the procedures used to re-tabulate the data, which database it is using, what communities (or zip codes) are covered, the station(s) surveyed, and time periods covered. Because Nielsen routinely provides this information in a cover letter along with its survey data, it is most helpful if this letter is included. That way there is no doubt that the data provided was obtained from Nielsen. See *e.g.*, *Radio Perry, Inc.*, 11 FCC Rcd 10564, 10568-9 (1996); *Gulf-California Broadcast Company*, 21 FCC Rcd 3476, 3479-80 (2006). We further suggest that the petitioner make it clear that the data they are submitting, along with the description of methodology, are as agreed on between the petitioner and Nielsen.

¹⁶47 C.F.R. § 76.54(c). Section 76.54(c) states that "[n]otice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted Grade B contour the cable community or communities are located, in whole or in part, and on all other system community units, franchisees, and franchise applicants in the cable community or communities at least (30) days prior to the initial survey period."

¹⁷*Id.*

errors or clarify issues related to the methodology before the data are purchased and the petition is actually filed and, perhaps, avoid the filing of oppositions. Finally, we note that the manner in which surveys based on sweep periods are averaged, remains the same as for weekly surveys.¹⁸ A petitioner may therefore submit the average of the two sweep periods for each year. If, however, a petitioner submits more than two sweep periods, in addition to the average or combined audience shares for the year, it must also include the separate sweep data for each individual sweep period used. This ensures that the reported audience results data are not skewed by the choice of sweep periods.

5. KXAN-TV seeks a waiver of the significantly viewed exception so that it may enforce its network nonduplication and syndicated exclusivity rights against KCEN-TV for the communities of Georgetown and Round Rock, Texas.¹⁹ KCEN-TV is considered to be significantly viewed in Williamson and Travis Counties, Texas, where the communities of Georgetown and Round Rock are located.²⁰

6. In support of its petition, KXAN-TV states that it is licensed to a community in the Austin, Texas designated market area ("DMA"), while KCEN-TV is licensed to a community located in the Waco, Texas DMA.²¹ KXAN-TV argues that it would normally be entitled to assert exclusivity protection against KCEN-TV in the communities of Georgetown and Round Rock, but it cannot because KCEN-TV is considered significantly viewed in Williamson and Travis Counties, where the subject communities are located.²² KXAN-TV maintains, however, that KCEN-TV no longer meets the significantly viewed standard in Georgetown and Round Rock and, as proof, it submits the results of two separate community-specific re-tabulations of Nielsen data based on noncable/non-ADS homes for the specified zip codes comprising the communities of Georgetown and Round Rock.²³ The submitted data are averages for two four-week audience sweep periods in each of two consecutive years.²⁴ The first year's survey audience estimates were derived from February 2006 and November 2006 audience sweep data, combined, and the second year's estimates from the February 2007 and November 2007 audience sweep data, combined.²⁵ These survey dates and the method used to combine audience surveys are consistent with the requirements set forth in Section 76.54(b) of the Commission's rules.²⁶ KXAN-TV

¹⁸Section 76.54(b) states that "[i]f two surveys are taken, they shall include samples sufficient to assure that the combined surveys result in an average figure at least one standard error above the required viewing levels. If surveys are taken for more than 2-weekly periods in any 12 months, all such surveys must result in an average figure at least one standard error above the required viewing level."

¹⁹Petition at 1.

²⁰*Id.* at 4. Georgetown is located in Williamson County, while Round Rock is located in Williamson and Travis Counties.

²¹*Id.* at 3-4.

²²*Id.* at 2. KXAN-TV states that KCEN-TV achieved its significantly viewed status by its inclusion in Appendix B to the *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 378 (1972).

²³*Id.* at Exhibit 1. Nielsen defines Alternative Delivery Source ("ADS") to include the following technologies: satellite (C-Band), DBS (Ku-Band), SMATV (master antennae), and MMDS (includes multi-channel multi-point and multi-point distribution service). Thus, noncable/non-ADS homes are those that do not subscribe to an MVPD, and view the broadcast signal in question off-air. See Nielsen at <http://www.nielsenmedia.com/glossary/>.

²⁴*Id.*

²⁵*Id.*

²⁶47 C.F.R. § 76.54(b).

states that KCEN-TV's share of total viewing hours in over-the-air homes in Georgetown and Round Rock falls far short of the required significantly viewed minimums, within one standard error, as shown in the tables below:

TABLE 1 – KCEN-TV VIEWING IN ROUND ROCK, TX

<u>Survey Year</u> ²⁷	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Feb. 2006/ Nov. 2006	20	0.00	0.00	0.00	0.00
Feb. 2007/ Nov. 2007	14	0.00	0.00	0.00	0.00

TABLE 2 – KCEN-TV VIEWING IN GEORGETOWN, TX

<u>Survey Year</u>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Feb. 2006/ Nov. 2006	9	0.743	0.755	6.33	7.09
Feb. 2007/ Nov. 2007	8	0.00	0.00	0.00	0.00

As a result, KXAN-TV requests that the Commission grant its petition so that it can assert its exclusivity rights in Georgetown and Round Rock, Texas.

7. In opposition, Suddenlink states that it is concerned that the instant petition was prompted by KXAN-TV's desire to increase its negotiating leverage in a recent retransmission consent dispute by becoming the exclusive local provider of NBC programming at the expense of Suddenlink and its customers.²⁸ Suddenlink argues that KXAN-TV's petition is fatally flawed with respect to Georgetown, because, even if we were to grant the requested waiver, the exceptions to the application of our exclusivity rules would prevent KXAN-TV from asserting its rights against KCEN-TV in Georgetown.²⁹ Suddenlink points out that the community of Georgetown actually lies within KCEN-TV's Grade B contour and is within 35 miles of the station's community of license.³⁰ As a result, Suddenlink states that KCEN-TV would be exempt from signal carriage blackouts under the

²⁷The survey dates meet the criteria set forth in the rules and *KCST-TV* that the two one-week surveys be separated by at least 30 days and that both surveys may not occur between April and September.

²⁸Opposition at 1.

²⁹*Id.* at 2.

³⁰*Id.*

Commission's exclusivity rules even if KXAN-TV obtains a waiver of the existing "significantly viewed" exception.³¹ For this reason, Suddenlink maintains that KXAN-TV's petition should be dismissed as moot.

8. In this regard, Suddenlink argues that the Commission's rules expressly establish several "exceptions" to syndicated exclusivity blackouts, among them Section 76.106(a) which states that the syndicated programming portion of "a broadcast signal is not required to be deleted from a cable community unit when that cable community falls, in whole or in part, within that signal's grade B contour."³² In this instance, Suddenlink states that both KCEN-TV's analog Grade B and digital Noise Limited signal contours extend well beyond the community of Georgetown and, as a result, KCEN-TV would not be subject to a blackout of its syndicated programming.³³ Moreover, Suddenlink argues that Section 76.92(b) of the Commission's rules provides that a cable system need not provide network nonduplication protection against "television broadcast stations within whose [35 mile] specified zone the community of the community unit is located, in whole or in part."³⁴ Suddenlink states that while Georgetown lies within 35 miles of Austin, KXAN-TV's city of license, part of the community also lies within the 35-mile zone of Temple, KCEN-TV's city of license.³⁵ Accordingly, Section 76.92(b) would override any waiver requiring a blackout of network programming.³⁶

9. Even if the Commission does consider the merits of the petition, Suddenlink argues that

³¹Opposition at 3.

³²*Id.* at 3; *see also* 47 C.F.R. § 76.106(a). Although the Commission has not directly addressed the issue of what digital contour to use in place of the Grade B contour for purposes of the cable rules, the Commission has used the digital noise limited service contour ("NLSC") (*see* 47 C.F.R. §§ 76.122(j)(3) and 76.123(k)(3)) *See also* 47 C.F.R. § 73.622(e)) in place of the Grade B contour for purposes of its satellite network nonduplication and syndicated program exclusivity rules, which were intended to mirror the cable rules. In developing the satellite TV service rules, the Commission sought to ensure parity between cable operators and satellite carriers. *See Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Implementation of Section 340 of the Communications Act*, MB Docket No. 05-49, Report and Order, 20 FCC Rcd 17278, 17295-98, ¶¶ 38-42 (2005) ("*SHVERA Significantly Viewed Order*"). Noting that the NLSC is the "service contour relevant for a station's digital signal," the Commission "updated" the references to the Grade B contour in its satellite rules by adding references to the NLSC. *Id.* at 17292, ¶ 31, and 17298, ¶ 42, n.122. *See* 47 C.F.R. §§ 76.54(c), 76.122(j)(3) and 76.123 (k)(3). Indeed, the Commission's rules implementing the SHVERA and relating to satellite TV service have many examples showing that the analog Grade B contour and digital NLSC have been used as equivalent measures of a station's service area. *See Report To Congress: The Satellite Home Viewer Extension and Reauthorization Act of 2004; Study of Digital Television Field Strength Standards and Testing Procedures*; ET Docket No. 05-182, 20 FCC Rcd 19504, 19507, ¶ 3 (2005) (stating "For DTV stations, the counterparts to the Grade B signal intensity standards for analog television stations are the values set forth in Section 73.622(e) of the Commission's rules describing the DTV noise-limited service contour."); *see also Technical Standards For Determining Eligibility For Satellite-Delivered Network Signals Pursuant to the Satellite Home Viewer Extension and Reauthorization Act*, ET Docket No. 05-182, Notice of Inquiry, 20 FCC Rcd 9349, 9350, ¶ 2 (2005). Therefore, based on our careful review of the specific facts and circumstances of this case, we believe that it is appropriate for us to use the NLSC, which Suddenlink has provided, in place of the Grade B contour for purposes of our analysis and application of the cable network nonduplication and syndicated program exclusivity rules here.

³³Opposition at 3.

³⁴*Id.*, citing 47 C.F.R. § 76.92(b).

³⁵*Id.* at Attachment C.

³⁶*Id.* at 4.

the limited data presented in this case does not justify any change in KCEN-TV's significantly viewed status.³⁷ Suddenlink notes that, because KXAN-TV based its showing on the very limited non-cable/non-ADS household data Nielsen already had available, the data for Georgetown is based on just 6 diaries from February 2006, 5 diaries from February 2007, and 3 diaries each from November 2006 and 2007.³⁸ Suddenlink maintains that such a sample size is too small to calculate a meaningful standard error. While Section 76.54 of the Commission's rules requires a margin of "one standard error," Suddenlink argues that a standard error calculation cannot entirely compensate for nor insure reliability of an extraordinarily small sample, as is the case here.³⁹ Suddenlink states that this deficiency may not have been particularly troubling when parties filed waiver requests on the basis of new surveys undertaken specifically for evaluating "significantly viewed" status, as envisioned pursuant to Section 76.54(c) of the rules, but KXAN-TV is, in this instance, relying on existing Nielsen data gathered for very different purposes.⁴⁰ Suddenlink argues that the risk associated with this sort of petition and the potential disruption to established viewing is heightened at the current time due to the contentious nature of retransmission consent negotiations. As a result, Suddenlink suggests that the Commission should place a heavy burden on a broadcaster seeking to diminish access to broadcast programming and decline to change long-established carriage rights based on very small audience samples.

10. Suddenlink argues further that the petition does not state that the Nielsen Study was limited to households in the portion of the three reported zip codes that are actually situated within the City of Georgetown boundaries.⁴¹ Suddenlink states that significant portions of the reported zip codes actually lie outside of Georgetown.⁴² Unless Nielsen can represent that it has already adjusted this factor, Suddenlink argues that the Commission must assume that only a portion of the households used in the Nielsen study are actually located within the community of Georgetown.⁴³ Suddenlink also points to three other errors in the surveys provided by KXAN-TV. First, Suddenlink states that while the four surveys provided by KXAN-TV might ordinarily satisfy Commission requirements, it is clear that, pursuant to Section 76.54(b) of the rules, Nielsen had additional surveys that it did not include in its analysis.⁴⁴ Suddenlink maintains that the existing Nielsen study should be rejected for failing to include data from the additional sweeps periods.⁴⁵ Second, while it is not clear precisely how Nielsen calculated its standard error, it appears that Nielsen may have pooled data from different survey periods before calculating the standard error.⁴⁶ Suddenlink states that this pooling approach potentially depresses the

³⁷*Id.*

³⁸*Id.*

³⁹Opposition at 5-6; *see also* Attachment D, "Declaration of Dennis Gilliland, Ph.D.," and 47 C.F.R. §76.54.

⁴⁰Opposition at 6; *see also* 47 C.F.R. § 76.54(c).

⁴¹*Id.* at 7.

⁴²*Id.* at Attachment E. Suddenlink states that only 62 percent of the households in zip code 78626 are situated within the Georgetown boundary, and only 70 percent of the households in zip code 78628 are within the city limits. Moreover, zip code 78727 is a "postbox" zip code, so it is impossible to determine whether the associated households lie inside or outside the City.

⁴³*Id.* at 7.

⁴⁴*Id.*, citing 47 C.F.R. § 76.54(b) ("If surveys are taken for more than 2-weekly periods in any 12 months, all such surveys must result in an average figure at least one standard error above the required viewing level.").

⁴⁵*Id.* at 8.

⁴⁶*Id.*

reported standard error.⁴⁷ Third, although Nielsen acknowledges that its analysis relies on “weighting,” it fails to explain precisely what that means. Suddenlink states that it appears that Nielsen employed weighting developed for a different purpose than the current analysis, a practice which may introduce a potential bias in the Nielsen study.⁴⁸

11. In reply, KXAN-TV argues that Suddenlink falsely claims that because KCEN-TV’s 35-mile zone encompasses Georgetown, its nonduplication rights should trump those of KXAN-TV.⁴⁹ KXAN-TV notes, however, that only a small portion of Georgetown’s municipal territory is within KCEN-TV’s 35-mile radius and that portion is mostly a result of recent annexations.⁵⁰ While a community only partially within a station’s specified zone may be treated as wholly within the zone, pursuant to Section 76.92(b)(1) of the rules, KXAN-TV argues that the Commission has not applied this rule where the overlap includes only a minimal portion of city land area or population.⁵¹ KXAN-TV points out that in *Capitol Cablevision Corp.*, the Commission extended nonduplication rights to an Oak Hill, West Virginia station in the community of Charleston, West Virginia, despite the fact that a small portion of Charleston was within 35 miles of Oak Hill.⁵² KXAN-TV argues that, similarly, the logic and policy of the nonduplication rules should persuade the Commission to grant its petition with respect to Georgetown.⁵³ KXAN-TV is the local NBC affiliate for the Austin DMA, which includes Georgetown, and, according to the latest-available census, approximately 16.9 percent of the community’s population is within 35-miles of Temple, KCEN-TV’s city of license.⁵⁴ KXAN-TV maintains, that, as in *Capitol Cablevision*, this minimal portion should not be used to overcome the Commission’s long-standing policy and precedent with respect to the nonduplication rules and support for local broadcasters.⁵⁵

12. KXAN-TV argues further that none of Suddenlink’s objections to Nielsen’s data and methodology are specific to the petition and all should be rejected here as they have been previously rejected by the Commission.⁵⁶ First, KXAN-TV argues that the Commission regularly accepts the validity of Nielsen data with an even smaller number of diaries than submitted by KXAN-TV and that the possibility of small diary samples is part of the reason to include a standard error calculation.⁵⁷

⁴⁷*Id.* at 8 and Attachment D.

⁴⁸*Id.* at 8-9.

⁴⁹Reply at 4.

⁵⁰*Id.* at n.10. KXAN-TV states that much of the land at issue here is agricultural land only recently annexed by the city and that the traditional city limits of Georgetown lie entirely outside the 35-mile zone of KCEN-TV. *Id.* at 5.

⁵¹*Id.*, citing *Sabre Cablevision Co., Inc.*, 52 FCC 2d 328, 331-32 (1975) (applying *de minimis* principle where “5.6% of the total homes in the community lie within the affected area”); *Continental Cablevision of Lansing, Inc.*, 57 FCC 2d 86, ¶7 (1975) (waiver granted to bar cable operator from carrying signal despite fact that small portion of the cable community lay within a county where the signal was deemed “significantly viewed”); *Village CATV, Inc.*, 39 FCC 2d 288 (1973) (waiver granted despite .34 square miles within zone).

⁵²*Id.* at 4-5, citing 71 FCC 2d 281, 283-84 (1979).

⁵³*Id.* at 5.

⁵⁴*Id.* at Exhibit 1.

⁵⁵*Id.* at 5.

⁵⁶*Id.* at 6.

⁵⁷*Id.*, citing *Gulf-California Broadcast Co.*, DA 08-1072 at ¶ 9 (rel. May 6, 2008).

Second, Nielsen survey data is organized geographically by zip code, thus community-specific surveys relating to “significantly viewed” status use zip codes as a proxy to determine which diaries fall within the relevant community.⁵⁸ KXAN-TV states that while the use of zip codes is not a perfect proxy, it has become the standard means of identifying those Nielsen diaries that come from within a community.⁵⁹ KXAN-TV notes that Suddenlink uses outdated data to compute the percentage of residents of the relevant zip codes that do not live in Georgetown.⁶⁰ Third, KXAN-TV argues that Suddenlink’s “insinuation” that KXAN-TV omitted other Nielsen survey periods that might have revealed higher viewership of KCEN-TV is not only false, but wholly speculative and ignores clear Commission guidance on the use of Nielsen data.⁶¹ For the surveys used herein, KXAN-TV states that Nielsen used data collected “over four week periods during the February 2006, November 2006, February 2007, and November 2007 measurement periods” and contends that Suddenlink offers no evidence that KXAN-TV or Nielsen “cherry-picked” the survey periods it chose.⁶² In any event, KXAN-TV states that the submission of more survey periods would not only be unusual, but is not required.⁶³ KXAN-TV concludes that, despite Suddenlink’s attacks on Nielsen’s standard error and weighting methodology, there is no indication that Nielsen’s practices in this regard are in any respect different from those used in prior petitions granted by the Commission.⁶⁴

13. In a Surreply, Suddenlink argues that KXAN-TV is mistaken in its contention that the Commission should simply disregard Section 76.92(b) of the rules which automatically exempts KCEN-TV from network nonduplication blackouts.⁶⁵ Suddenlink points out that not only did KXAN-TV not raise the overlap issue in its original petition, but it never expressly requested a waiver of Section 76.92(b) in its reply.⁶⁶ Suddenlink maintains that the Commission’s rules are clear that the geographic overlap present in this case necessarily precludes network nonduplication blackouts in the community of Georgetown, regardless of any change in KCEN-TV’s significantly viewed status.⁶⁷ Suddenlink states that if KXAN-TV wishes to enforce its network nonduplication rights against KCEN-TV in the community of Georgetown, it can do so only as the result of a direct waiver of Section 76.92(b).⁶⁸ In any event, Suddenlink points out that none of the cases cited by KXAN-TV in support of its “*de minimis*” argument represent situations that are remotely similar to the instant case. Suddenlink argues that even KXAN-TV conceded in its reply that 16.9 percent of Georgetown’s population resided in the overlap

⁵⁸*Id.* at 7, citing *Gulf-California* at ¶ 4 n.13.

⁵⁹*Id.*, citing *KSWB, Inc.*, 13 FCC Rcd 15470, ¶ 15 (1998) (“KCOP’s criticism that the survey improperly relied on . . . identification of the communities served by zip codes is rejected.”).

⁶⁰*Id.*

⁶¹*Id.* at 8.

⁶²*Id.*

⁶³*Id.* at 9, citing *Gulf-California* at ¶ 4 n.12.

⁶⁴*Id.*, citing *Meredith Corp.*, 22 FCC Rcd 12932 (2007); *Barrington Broadcasting Flint Corp.*, 19 FCC Rcd 22046 (2004); *MMM License LLC*, 17 FCC Rcd 20875 (2002).

⁶⁵Surreply at 1. Suddenlink also stated that it continued to disagree with KXAN-TV’s failure to directly address in its reply the numerous statistical concerns that were raised in opposition.

⁶⁶*Id.* at 2.

⁶⁷*Id.*

⁶⁸*Id.*

area, many of whom are Suddenlink subscribers.⁶⁹ Suddenlink notes that that percentage stands in sharp contrast to the cases cited by KXAN-TV, the majority of which involved overlap areas which contained no population at all and only one which extended for 0.46 miles and involved just 5.6 percent of the community's population.⁷⁰ Moreover, Suddenlink asserts, it should be noted that the *de minimis* cases KXAN-TV cited are more than three decades old and were decided under an entirely different signal carriage regime than exists now.⁷¹ Suddenlink contends that accepting KXAN-TV's "cavalier attitude" and ignoring the sizeable overlap in this case would represent a startling departure from established Commission practice.⁷²

III. DISCUSSION

14. With regard to the significantly viewed issue, we find that KXAN-TV made the requisite showing to support its petition. As required by the rules, KXAN-TV has provided community-specific survey results for each community for each year surveyed. For the community of Round Rock, for both years, the share of total viewing hours and net weekly circulation share is zero. Because the submitted data represent the lack of viewing from a reasonable sample, we conclude that KCEN-TV attains approximately no viewing in the community of Round Rock.

15. For the community of Georgetown, the combined results obtained by Nielsen for February 2006/November 2006 survey periods, indicate that KCEN-TV attains a 1.498 percent share of total weekly viewing hours (0.743 reported share + 0.755 standard error) and 13.42 percent average net weekly circulation share (6.33 reported share + 7.09 standard error). The combined results for the February 2007/November 2007 survey periods indicate that KCEN-TV attains a 1.256 percent share of total weekly viewing hours (0.599 reported share + 0.657 standard error) and a 25.0 percent average net weekly circulation share (12.5 reported share + 12.5 standard error). In order for a network affiliate, such as KCEN-TV, to be significantly viewed, its audience must exceed an average 3 percent share of total weekly viewing hours and an average 25 percent net weekly circulation share, as set forth in Section 76.5(i) of the Commission's rules.⁷³ For the first year, the survey results show that KCEN-TV does not meet these criteria. For the second year, KCEN-TV's share of total viewing hours is below the required 3 percent criteria, but when the standard errors for the net weekly circulation share are added to the reported audience share, the resulting audience estimate meets the 25 percent criteria for that prong of the test for significantly viewed status. However, in order to demonstrate significantly viewed status, a station must exceed both the total weekly viewing share and the net weekly circulation share by one standard error. Because both conditions have not been satisfied, KXAN-TV has demonstrated that KCEN-TV is no longer significantly viewed in the community of Georgetown.

16. With regard to the statistical methodology used in the survey submitted for the community of Georgetown, we find that KXAN-TV satisfies the requirements to demonstrate that KCEN-TV is no longer significantly viewed in Georgetown, based on *KCST-TV* and the subsequent

⁶⁹*Id.* at 2-3.

⁷⁰*Id.* at 3, citing *Sabre Cablevision Co, Inc.*, 52 FCC 2d 328 (1975).

⁷¹*Id.* at 3. Suddenlink states that, in fact, the Commission previously considered network nonduplication waivers under a different evidentiary test that considered the potential impact the requested waiver would have on the broadcaster.

⁷²*Id.* at 3-4.

⁷³47 C.F.R. § 76.5(i).

precedents we have developed for such showings. Suddenlink, raises a number of points about the statistical methodology used for significantly viewed studies and we recognize that the established statistical procedures have been adapted over time for such showings. Beginning with the 1970-1971 surveys used to establish the original significantly viewed list, stations were declared significantly viewed on as few as 5 diaries, and we note that neither standard errors nor other measures of statistical reliability were employed at that time. In this case, KXAN-TV provides good support for its use of the specific Nielsen data provided and its cites to previous similar Commission cases only further supports acceptance of this data.⁷⁴ In particular, the Commission has determined that Nielsen's existing data are acceptable for demonstrating whether a station meets the criteria for significantly viewed status. For this purpose, we have determined that we will accept a small sample, as long as it is sufficient to calculate an arithmetic average, relying on the standard error calculation to allow us to compare the estimate of a station's actual viewing level to the significantly viewed criteria with reasonable accuracy. We further recognize that the cost of obtaining new data is likely to be prohibitive and there are essentially no other sources to provide this information to petitioners seeking to obtain significantly viewed status or the relevant waivers. Nielsen does not claim that the data are designed for this purpose, but assists petitioners as much as possible with existing data using the community defined by the zip codes provided by the petitioner. With respect to the zip codes, while we cannot verify the claims regarding the correct placement of zip codes, it appears that KXAN-TV did provide Suddenlink with a Section 76.54(c) notification.⁷⁵ Finally, we concur with KXAN-TV that the Nielsen data and the methodology used is consistent with the requirements set forth in *KCST-TV* and Bureau precedent.

17. With regard to KXAN-TV's assertion of network non-duplication in Georgetown, we find the "overlap" issue determinative for the community of Georgetown. We note that KXAN-TV did not specifically ask for a waiver of Section 76.92(b) of the rules, we nevertheless believe that such was KXAN-TV's intention from the content of its pleading. However, we find that the overlap area in this case includes a significantly greater percentage of affected population than in any of the cases cited by KXAN-TV and also significantly greater than in any such waivers previously granted by the Commission.⁷⁶ In the case cited by KXAN, *Capitol Cablevision Corp.*, the Commission, in granting the requested *de minimis* waiver, concluded that the overlap was one-third of a square mile out of twenty-nine total miles with a presumed proportional population.⁷⁷ This is appreciably less than the 16.9 percent pled by KXAN-TV in this instance. Moreover, KXAN-TV fails to provide any other justification that would warrant grant of a waiver. Therefore, to the extent KXAN-TV's petition intended to seek waiver of Section 76.92(b)(1) of the Commission's rules, such request is denied. Consequently, Section 76.92(b)(1) prevents KXAN-TV from asserting its network nonduplication rights against KCEN-TV in Georgetown.

⁷⁴See Petition at 5-6 n.16-19, citing *Radio Perry, Inc.*, 11 FCC Rcd 2d 10564, para. 8 (1996) (significantly viewed surveys must provide a sufficient explanation of the submitted data); *Barrington Broadcasting Flint Corporation*, 22 FCC Rcd 12932 (2007); *MMM License, LLC*, 17 FCC Rcd 20875, para. 6 (2002); *WTNH Broadcasting, Inc.*, 16 FCC Rcd 16377, para. 3 (2001); *Desert Empire*, 7 FCC Rcd 4214 (1992); *Russell-Rowe*, 7 FCC Rcd 2525, 2527 (1992); *KWSB, Inc.*, 13 FCC Rcd 15470, para. 9 (finding that petitioners are permitted to provide the zip codes used in Nielsen significantly viewing studies).

⁷⁵See Opposition at Attachment A (Suddenlink's response to notice and reserving its right to object).

⁷⁶See e.g., *Village CATV, Inc.*, 39 FCC 2d 288 (1973); *Putnam All Channel Cable Vision, Inc.*, 70 FCC 2d 695 (1979); *Continental Cablevision of Lansing, Inc.*, 57 FCC 2d 86 (1975); *Cable TV Systems, Inc.*, 69 FCC 2d 1512 (1978).

⁷⁷*Supra* n.52.

18. With respect to KXAN-TV's attempt to assert syndicated exclusivity in Georgetown, it is undisputed that KCEN-TV's digital noise limited service contour encompasses Georgetown, as did its analog Grade B contour. Therefore, pursuant to Section 76.106(a), Suddenlink need not provide KXAN-TV with syndicated exclusivity protection in Georgetown.

19. In conclusion, notwithstanding our finding with regard to the significantly viewed status of KCEN-TV in Georgetown, pursuant to Section 76.92(b), Suddenlink is not required to provide network nonduplication protection to KXAN-TV in the community of Georgetown nor is it required to provide syndicated exclusivity protection in Georgetown pursuant to section 76.106(a) of our rules.

IV. ORDERING CLAUSES

20. Accordingly, **IT IS ORDERED**, that the petition filed by KXAN, Inc. **IS GRANTED, in part**, to the extent indicated above and otherwise DENIED.

21. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.⁷⁸

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Senior Deputy Chief, Policy Division
Media Bureau

⁷⁸47 C.F.R. §0.283.